DOCKET FILE COPY ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

June 18, 1998

VIA HAND DELIVERY

Magalie Salas, Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: In the matter of Petition of the ALTS for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-78

Dear Ms. Salas:

Please find enclosed for filing an original and 12 copies of Comments of SBC Communications, Inc. in the above-captioned proceeding.

Please date-stamp and return the extra copy provided to the individual delivering this package.

Sincerely,

Michael K. Kellogg

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996

CC Docket No. 98-78

ORIGINAL

COMMENTS OF
SBC COMMUNICATIONS, INC.

Robert M. Lynch
Durward D. Dupre
Daryl W. Howard
SBC COMMUNICATIONS, INC.
One Bell Plaza, Rm. 3703
Dallas, Texas 75202
(214) 464-4244

Michael K. Kellogg
Evan T. Leo
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
(202) 326-7900

June 18, 1998

SUMMARY

ALTS invites the Commission to regulate immediately and comprehensively a vast, open-ended, class of facilities and services -- digital-broadband services, facilities, and technologies -- that a number of competitors are only just beginning to deploy. ALTS does not define with any specificity the category of facilities and services that it wants the Commission to regulate. And ALTS makes no attempt to frame its petition in the economic terms that the Commission has used to structure its regulation -- and deregulation -- of telecom services for the past three decades.

For over twenty years, the Commission has pursued a consistent policy of not regulating innovative services offered in competitive markets, and – above all -- of not regulating non-dominant, second-to-market providers of such services. This precedent, as well as the 1996 Act and compelling economic logic, require the Commission to do precisely the opposite of what ALTS demands.

As ALTS itself states, incumbent LECs are not, to any significant degree, currently offering the services that ALTS wants to see regulated. Incumbent LECs are certainly not "dominant" providers of these emerging services. To the contrary, ALTS itself insists that today's dominant providers of such services are the members of ALTS – competitive local exchange carriers ("CLECs"). LECs that do begin providing high-speed data services will likely remain non-dominant for the foreseeable future.

Other providers of high-speed data services, members of ALTS among them, are providing them over other media. Cable modem and DBS providers each operate their own, completely independent networks and distribution facilities. Similarly, CLECs do not rely on

incumbent LECs' facilities to serve many large business customers; CLECs serve those customers over their own competitive fiber-optic networks. CLECs that opt to use copper loop, rather than cable or wireless technology, to provide high-speed data services are already guaranteed access to the unbundled loop, and the right to collocate the facilities that connect to it.

In sum, the emerging market(s) for high-speed data services are being served competitively, incumbent LECs are not dominant providers in these emerging market(s), copper loop is not essential to serve these markets, and copper loop is, in any event, fully unbundled and available to collocated competitors on demand. The Commission should accordingly reject ALTS's attempt to use Section 706 to re-litigate interconnection issues already resolved by the Commission and state regulators, or currently pending in interconnection and arbitration proceedings. Prematurely extending unbundling and interconnection to this new, emerging class of networks, at this early point in their evolution, would be inconsistent with the purpose of this regime, with decades of established Commission policy, and with the particular language and intent of Section 706.

If at some point in the future LECs – or, equally, one or another of ALTS's own members – should emerge as a market-dominant provider of high-speed data services, the Commission will, of course, remain free to regulate as necessary, consistent with its powers under Section 251 of the 1996 Act, or its other authority under the 1934 Act. For now, Sections 706 and 10 grant the Commission authority to deregulate these emerging, high-technology, innovative markets. The Commission should do so, as SBC and other LECs have asked the Commission to do in prior petitions. In the present competitive environment, deregulation will spur new investment by both LECs and CLECs alike.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	CC Docket No. 98-78

COMMENTS OF
SBC COMMUNICATIONS, INC.

SBC Communications, Inc. ("SBC") submits these comments in response to the Petition for a Declaratory Ruling filed by the Association for Local Telecommunications Services ("ALTS"). In its petition, ALTS seeks a declaratory ruling that Sections 251, 252, and 271 of the Communications Act "apply to the deployment of advanced data networks, and that CLECs have the same rights with respect to access to advanced data networks as they have for conventional 'POTS' and other telecommunications services."[1]

ALTS is attempting to regulate immediately a vast, entirely open-ended, class of facilities and services -- digital-broadband services, facilities, and technologies -- that a number of competitors are only just beginning to deploy. ALTS is inviting the Commission to regulate

[1] ALTS Pet. at 1.

comprehensively every last corner of an emerging technological future that ALTS cannot even begin fully to describe. SBC opposes this outlandish proposal.

As ALTS itself admits, incumbent LECs are not, to any significant degree, currently offering the services that ALTS wants to see regulated. Incumbent LECs certainly are not "dominant" providers of these anticipated services. To the contrary, ALTS itself insists that today's dominant providers of such services are the members of ALTS – competitive local exchange carriers ("CLECs"). CLECs, ALTS informs the Commission, "were the first" to deploy high-speed data networks and "continue to deploy such advanced technologies at a dramatic pace."[2] They are "aggressively providing digital services throughout the nation," offering "advanced telecommunications capability to the public today," after having deployed their advanced networks "in hundreds of markets in only a few years' time."[3] By contrast, ALTS states, incumbent LECs have deployed advanced technology at a "lethargic pace" and "only in response to competitive pressures brought on by the CLEC industry."[4]

The 1996 Telecommunications Act ("1996 Act"), nearly twenty years of Commission precedent, and compelling economic logic require the Commission to do precisely the opposite of what ALTS demands. As SBC's affiliated Bell Operating Companies and other Bell Companies have requested in other petitions,[5] the Commission should adhere to its longstanding

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[2] Id. at ii (emphasis added).

[3] Id. at 4, 6, 9 (all emphases added).

[4] Id. at 5 (emphasis in original).

[5] See Bell Atlantic's Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11; Petition of U S West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26; Petition of Ameritech Corporation to Remove Barriers to Investment in

policies of not regulating innovative services offered in competitive markets, and -- above all -- of not regulating non-dominant, second-to-market providers of such services.

Beginning with the detariffing of customer premises equipment ("CPE") and information services in the 1970s and early 1980s, the Commission has pursued a consistent policy of distinguishing monopoly from competitive services, and dominant from non-dominant providers, and of deregulating both competitive services and non-dominant providers. In the 1980s and 1990s, the Commission reaffirmed that policy in the context of long-distance and wireless markets. The Commission and the 1996 Act both require similar policies in the context of local exchange markets (the voice phone services of non-dominant CLECs are largely deregulated), and video markets (video services are largely deregulated when offered by LECs in competition with incumbent cable companies).

ALTS's petition is flatly inconsistent with this established policy and long line of precedent. The petition is, in addition, a blatant and late attempt to reopen and relitigate issues that ALTS's members have raised in federal and state proceedings concerning Sections 251-252 and 271 of the Act. Section 706 – an unambiguously deregulatory provision of the 1996 Act – was never intended to bear such legal weight, and cannot lawfully do so.

ARGUMENT

ALTS's petition asks the Commission to subject a vast range of facilities and services -- the deployment of "advanced data networks" and other "digital and broadband" "facilities," "services" and "technologies" – to the most demanding regulatory provisions of the

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Advanced Telecommunications Capability, CC Docket No. 98-32.

Communications Act – the unbundling and interconnection provisions of Sections 251, 252, and 271.[6] Neither the Communications Act nor the Commission's rules define any of the facilities and services ALTS is so eager to see regulated.[7] Neither does ALTS itself.

ALTS describes no product or geographic market. Other than declaring that its own members are today's dominant providers of what it has in mind, ALTS does not discuss the state of competition in the undefined markets that it wants to see regulated. In short, ALTS makes no attempt to frame its petition in the economic terms that the Commission has used to structure its regulation -- and deregulation -- of telecom services for the past three decades. Nor does ALTS make any attempt to square its petition with the express language of the 1996 Act in general, and Section 706 in particular, which unambiguously require deregulation of competitive services, and most particularly deregulation of innovative, broadband digital facilities and services.

1. Conventional POTS and High-Speed Data Services are Different Markets.

High-speed data networks may be used for a wide variety of services. The only thing clear about this undefined cluster of emerging markets is that, from both the supply and demand side, they are quite different from the familiar market for basic, local telephone service. These

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[6] See ALTS Pet. at 1 (FCC should issue a declaratory ruling that Sections 251, 252, and 271 of the Communications Act "apply to the deployment of advanced data networks. . ."); id. at 2 (the FCC should declare that Sections 251, 252, and 271 "apply fully to digital and broadband services and facilities."); id. at 3 ("clarify[] that Sections 251-252 of the Act are fully applicable to digital and broadband facilities and services."); id. ("clarify[] that digital and broadband technology is subject to the unbundling requirements of the 1996 Act."). All emphases added.

[7] The Act does, by contrast, define numerous other service categories. See, e.g., 47 U.S.C. § 153(7) ("Cable Service"); id. § 153(20) ("Information Service"); id. § 153(27) ("Mobile Service"); id. § 153(46) ("Telecommunications Service"); id. § 153(47) ("Telephone Exchange Service"); id. § 153(48) ("Telephone Toll Service"); id. § 706 ("advanced telecommunications capability").

services are at least as different from POTS as today's video or wireless services. In other words, they occupy separate markets.

On the supply side, high-speed data networks require costly new digital equipment that is simply not used at all in today's analog voice networks. To provide ADSL service, for example, a CLEC or incumbent LEC must deploy (1) a Digital Subscriber Line Multiplexer ("DSLAM") in a central office; and (2) a fast-packet or ATM switch to route high-speed data traffic from there on out (e.g., to a corporate LAN or Internet Service Provider).[8] This equipment offers digital transmission speeds that are orders of magnitude higher than the analog speeds supported by the CPE, line-terminating cards, and circuit switches of the basic voice network.[9] The new digital equipment is expensive.[10]

On the demand side, consumers must accordingly pay a lot more to use it than they do to use the analog facilities that carry ordinary voice calls.[11] Virtually all consumers use

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[8] In addition, the customer must obtain an ADSL modem compatible with the carrier's DSLAM. ADSL service is described in greater detail in the Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Relief from Regulation, pp. 6-10 (Jun. 9, 1998) ("SBC's Petition for Relief").

[9] For example, SBC LECs currently plan to offer the following transmission configurations (downstream/upstream): 384 Kbps/128 Kbps; 384 Kbps/384 Kbps; 1.54 megabits per second/384 Kbps. See id. at 8. By contrast, the maximum obtainable transmission speed using an analog modem is 56 Kbps. See L. Freed, Fast Connections for All?, PC Magazine, Oct. 21, 1996, at 83.

[10] Estimates range from $700 to over $3,000 per subscriber. See, e.g., Telecom Industry Sees $2 Billion Investment To Install High-Speed Services, Communications Daily, Mar. 19, 1998 (noting cost estimates for U S West's ADSL roll-out at roughly $700/home); J.J. Bellace, et al., Merrill Lynch Capital Markets, Ind. Rpt. No. 1869480, The ABC's of Wireline Equipment: Global *21 (Mar. 13, 1997) ("Currently, costs are around $1,500-3,000 per subscriber."); Comments of AT&T Corp., Usage of the Public Switched Network by Information Service and Internet Service Providers, CC Dkt. No. 96-263 (F.C.C. 1997) ("DSL technology is very expensive to deploy (*i.e.*, estimates are $1500 to $3000 per customer). . .").

[11] The average price of a basic residential POTS line is $17 per month and a business line $30 per

conventional voice service.[12] But if they subscribe at all – and only a minority do[13] -- consumers use high-speed data networks today mainly for high-speed access to the Internet and other on-line information services.[14]

The high-speed data services at issue in the various 706 proceedings are also distinguishable from T-1 and ISDN service, which are already subject to the unbundling and interconnection obligations of Sections 251/252. Both T-1 and ISDN are provided using the same core components of the legacy local exchange network that incumbent LECs use to provide conventional POTS, including the large embedded base of circuit switches. They are therefore remnants of the old, conventional voice network that was built up during the era of exclusive

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month. See FCC, Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service, at 24. (Mar. 1997). By contrast, ADSL services will be priced at around $50 per month for slower-speed (700 kilobits per second) services aimed at residential customers, and several hundred dollars for higher-speed services (up to 7 megabits per second) aimed at business customers. See e.g., P. Burrows and R. Grover, U S WEST Scouts a New Frontier, Business Week, May, 18, 1998, at 164; New Bell Atlantic High-Speed ADSL Service To Shift Internet Surfers Into HyperDrive, PR Newswire Financial News, Jun. 3, 1998. The Commission has stated that price is an important factor in determining whether two products compete in the same market. See, e.g., Second Annual Report On Competition In The Commercial Mobile Radio Services, 12 FCC Rcd 11266, 11324 (Mar. 6, 1997) ("A key aspect of our analysis of the extent to which wireless services are being used as a substitute for wireline services is to look at the prices for both types of services").

[12] Ninety-four percent of all U.S. households receive basic telephone service. Trends in Telephone Service, Table 15.1, F.C.C., Feb. 1998. The Commission has indeed noted in the past that for basic telephone services, "demand tends to be inelastic." Petition of the State of Michigan Concerning the Effects of Certain Federal Decisions on Local Telephone Service, 96 FCC2d 491, 513 (1983).

[13] Less than a third of all homes currently have a modem-equipped PC connected to their basic telephone line. See Communications Today, Jan. 8, 1998.

[14] There is, of course, some substitution at the margin between high-speed data services and ordinary voice lines (particularly second residential lines), but there is substitution at the margin for almost everything in telecommunications today. For now, at least, the two markets remain separate.

franchise, and not of the emerging next generation of high-speed data networks that CLECs, incumbent LECs, cable operators and others are now deploying. ISDN service, for example, is a medium-band service; it does not offer enough bandwidth to support many applications, including full-time, dedicated access to the Internet.[15] T-1 services are used almost exclusively by larger businesses, not by residential and small-business users.[16] Even if incumbent LECs remain primary or dominant providers of ISDN and T-1 services today (an increasingly doubtful proposition in itself), they are by no means competitors in the quite separate, emerging market(s) for the provision high-speed, lower-cost digital broadband services.

2. The Emerging Markets for High-Speed Data Services are Competitive.

Incumbent LECs are not monopoly providers of the services that comprise the emerging market(s) for "digital and broadband services and facilities."[17] Incumbent LECs arguably remain dominant providers of some analog voice services, some medium-band digital services like ISDN, and some traditional higher-speed data services (like T-1 lines) to businesses. But incumbent LECs are not, by any stretch of the imagination, today's dominant providers of "digital and broadband services and facilities." For residential and small-business consumers,

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[15] See, e.g., WorldCom Press Release, UUNet Details Nationwide Deployment of IDSL Technology, Mar. 12, 1997 ("While traditional ISDN and analog dial-up Internet access can support web browsing and email use, they are not designed to support Internet applications which require full-time, dedicated access.").

[16] As CLECs that provide DSL services have already acknowledged in 706 proceedings, T-1 services "are attractive to large businesses but impractical for small business or residential customers," whereas "DSL services are almost inherently targeted at residential and small business customers ." Comments of the DSL Access Telecommunications Alliance (DATA) at 5 & n.3, CC Docket Nos. 98-11, 98-26, 98-32 (RBOC 706 petitions) (FCC filed Apr. 6, 1998).

[17] ALTS Pet. at 2.

the main providers of such services today are cable companies and satellite carriers, along with various other, non-cable, wireline and wireless CLECs.

As we have described elsewhere,[18] over 11 million (10 percent) of all U.S. homes already have access to high-speed cable modem service. The Commission, too, has noted that approximately 35 percent of all cable systems have been upgraded with hybrid- fiber coax (HFC) network architecture,[19] which is the principal upgrade needed to provide cable modem service.[20] Hughes Electronics offers high-speed Internet access via DBS satellite to all U.S. households (particularly residential and rural ones) and small businesses with a line of sight to the equatorial sky.[21]

So far, by contrast, the five Regional Bells and GTE have merely announced plans to deploy ADSL services.[22] Plans, however serious and substantial, do not make for a "dominant"

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[18] See SBC's Petition for Relief at 11-15.

[19] See Annual Assessment of the Status of Competition in the Market for the Deliver of Video Programming, Third Annual Report, 12 FCC Rcd 4358, ¶172 (1997).

[20] See D. Shapiro, et al., Deutsche Morgan Grenfell Inc., Ind. Rpt. No. 1964154, Modems *3 (Aug. 27, 1997) (hybrid-fiber coax (HFC) rebuild or upgrade "is generally a precursor to deploying a two-way cable modem service, what is often overlooked is that several operators have been upgrading their networks diligently for the past three, four, and five years, and a great deal of this money has already been spent.").

[21] See SBC's Petition for Relief at 15.

[22] BellSouth plans to provide ADSL service beginning August 1998 in the following cities: Atlanta, Birmingham, Charlotte, Ft. Lauderdale, Jacksonville, New Orleans, and Raleigh. See http://www.bellsouth.net/external/asdl/city_availability.html. GTE plans to rollout service in 300 central offices in portions of 16 states. See http://www.gte.com/g/news/adsl1041398.html. Bell Atlantic is currently conducting service on a trial basis in northern Virginia and plans to roll out service in its region in September 1998. See http://www.bellatlantic.com/about/search.htm. U S West indicated that DSL service will be available in parts of its region beginning in late June 1998. See http://www.uswest.com/com/customers/interpries/dsl/availability.html. Ameritech is currently offering ASDL service in Ann Arbor and Royal Oak, Michigan. They plan to expand

market position here and now. By ALTS's account, its own members are the "pioneers" in these markets; SBC and other so-called "lethargic" incumbent LECs are playing catch up in the market. As ALTS itself points out, the emerging markets to which its petition is addressed are served today principally by its own members and other CLECs.[23]

Moreover, to the extent that incumbent LECs begin providing high-speed data services, they will almost certainly remain non-dominant and non-essential for the foreseeable future. Numerous competitors have ambitious plans to deploy digital broadband facilities. Cable operators are close to the halfway point in upgrading their networks to a digital HFC architecture that is capable of delivering telephone and other advanced information and two-way services,[24] and industry analysts project that over 60 percent of all cable systems will be cable-modem ready by the year 2000.[25] By that time, several broadband satellite networks are expected to be fully operational, including Iridium (Fall 1998), GlobalStar (1998), Ellipso (1998), Odyssey (2000), ICO (2000), Astrolink (2000), and Spaceway (2000).[26] CLECs, as ALTS notes, also plan to

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service to 70 percent of the Great Lakes region by the year 2000. See http://www.ameritech.com/products/about/answer/data.html.

[23] See ALTS Pet. at 6-10.

[24] As early as 1995, Cox had upgraded almost 80 percent of its systems to hybrid fiber-coax. See F.W. Moran, Salomon Brothers, Co. Rep. No. 1572392, Cox Communications, Inc. 4 (June 27, 1995). Comcast President Brian Roberts said he expects to have 85 percent of the company's network upgraded to be able to provide video and interactive programming to subscribers' homes by the end of 1998. S. Hamm, Microsoft: Cash to Burn and It's Just the Start, ZDNet News (June 10, 1997).

[25] See Allied Business Intelligence Press Release, http://www.alliedworld.com/ (CATV98.pdf release).

[26] See J. Montgomery, The Orbiting Internet, Fiber in the Sky, BYTE, at 58, Nov. 1997.

"continue their pioneering role in the deployment of advanced technologies and introduction of innovative new data services."[27]

3. CLECs Do Not Need Access to Next-Generation Digital Facilities Deployed By Incumbent LECs to Compete in the Provision of Advanced Digital Services.

Cable modem and DBS providers do not require unbundled access or interconnection to the local telephone network at all in order to provide their high-speed data services – they each operate their own, completely independent networks and distribution facilities. Similarly, CLECs do not rely on incumbent LECs' facilities to serve many large business customers; CLECs serve those customers over their own competitive fiber-optic networks.[28]

And CLECs that opt to use copper loop, rather than cable or wireless technology, to provide high-speed data services are already guaranteed access to the unbundled loop, and the right to collocate the facilities that connect to it, by the 251/252 unbundling and collocation regulations already in place.[29] SBC remains fully committed to providing CLECs with such access to unbundled loops.[30]

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[27] ALTS Pet. at ii.

[28] See id. at 7 (CLECs "throughout the U.S. have over a decade of experience providing advanced data services, including high-speed LAN, frame relay, ATM, Internet access, multipoint video, and private line services. Customers in these "on net" locations have ready access to advanced telecommunications capabilities today, through the efforts of CLECs – not the traditional local telephone monopolies."); see also Comments of the DSL Access Telecommunications Alliance (DATA) at 5 ("large business customers typically have a host of high speed options that do not depend on copper.").

[29] Several of ALTS's members have indeed acknowledged that Pacific Bell (in whose region more CLECs are providing DSL service than anywhere else in the U.S.) provides collocation for ADSL equipment.

[30] See generally SBC's Petition for Relief at 17-21.

With assured rights to collocate and to attach their own electronics to incumbent LECs' unbundled loops, CLECs are in the same competitive position as incumbents in the contest to provide high-speed digital services over existing loops.[31] Judging from their actions, ALTS's own members share that conclusion. CLECs have already signed over 2,400 interconnection agreements with incumbent LECs; they already sell over 140,000 loops; and they are already collocated at over 1,600 collocation points.[32]

4. Commission Precedent Supports the Further Deregulation of the Provision of High-Speed Data Services.

For over twenty years, the Commission has pursued a consistent policy of not regulating innovative services offered in competitive markets, and – above all -- of not regulating non-dominant, second-to-market providers of such services. It has been the Commission's unvarying policy carefully to demarcate less than fully competitive services, and to regulate those services alone, while deregulating competitive services on the other side of the boundary. And within markets that are less than fully competitive, it has been the Commission's unvarying policy to regulate only the dominant provider, not its competitors.

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[31] As discussed in SBC's Petition for Relief, SBC LECs have developed nondiscriminatory procedures to determine whether loops are ADSL-capable and, if so, to provide these loops to CLECs. All loops are checked and qualified on a "first asked, first qualified" basis as between SBC LECs and other carriers. SBC LECs also are instituting an ordering process to ensure equivalent access to loop qualification. A carrier purchasing ADSL-compatible loops from SBC LECs may therefore integrate these loops with its own electronics to offer ADSL and other services in the same manner that SBC LECs will offer such services.

[32] See USTA, Local Telephone Markets Are Open To Competition Fact Sheet, October, 1997.

In 1975, the FCC promulgated network interconnection standards for CPE;[33] several years later it ordered LECs to unbundle service from CPE and to detariff CPE offerings.[34] The Commission likewise drew a line in the regulatory sand between "computer-enhanced" services and "basic" transport services,[35] and ruled that all providers of the former would not be regulated by federal (or even state) authorities.[36] In the 1980s, the Commission promulgated standards for interconnection between the local exchange on the one hand, and long-distance,[37] cellular,[38] (and later PCS[39]) providers on the other. In each case the Commission deregulated services and providers on the competitive side of the regulatory divide.

The Commission has likewise pursued a consistent policy of permitting incumbent LECs to compete in fully competitive markets, subject to suitable separation of costs, whether or not incumbent LECs maintain control over what is a facility that is arguably "essential" to the

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[33] See Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), First Report and Order, 56 FCC2d 593 (1975).

[34] See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC2d 384, 446-47 (1980) ("Computer II Final Decision").

[35] See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Final Decision and Order, 28 FCC2d 267 (1971), aff'd in pertinent part sub nom., GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

[36] See Computer II Final Decision, 77 FCC2d at 428.

[37] See MTS and WATS Market Structure, Phase III, 100 FCC2d 860 (1985). The Commission later declared AT&T non-dominant in 1995, freeing it from price-cap regulation and numerous tariffing obligations. Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271 (1995).

[38] See Inquiry into the Use of the Bands 825-845 MHz for Cellular Communications Systems, 89 FCC2d 58, 80-82 (1982)

[39] See Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676, 5715 (1992)

relevant service. Thus, the Commission has permitted LECs to compete in the market for CPE and enhanced services,[40] inside wiring,[41] and, pursuant to a Congressional mandate,[42] wireless services.[43] In each of these instances, interconnection and unbundling regulation has required incumbent LECs to separate (unbundle) and provide non-discriminatory access only to the underlying, uncompetitive facilities, and not to competitive facilities and services that may attach to them.

Longstanding Commission policy and the 1996 Act likewise require deregulating second-to-market competitors and subsequent entrants. This was the original policy for competitive providers of CPE, enhanced services, and inside wiring. In the early 1990s, the Commission decided not to rate-regulate the special access and switched access services offered by competitive access providers.[44] The Commission has recently applied the same policy to CLECs

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[40] See Computer II Final Decision,77 FCC2d 384.

[41] See Review of Sections 68.104 and 68.123 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules, filed by the Electronic Industries Association, Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 4686 (1990).

[42] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002 (codified in principal part at 47 U.S.C.A. §332 (1995)).

[43] See Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994).

[44] See Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7381 (1992); Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993); Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994). The Commission also minimized CAPs' tariffing duties. See Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993); Application of Teleport Communications - New York, Memorandum Opinion and Order, 7 FCC Rcd 5986, 5986 (1992) ("[t]eleport is a non-dominant common carrier").

in the provision of local exchange voice phone service.[45] CLECs also are exempt from the stringent unbundling and interconnection duties of § 251(c), to which incumbent LECs are bound. LECs benefit from comparably favorable regulatory treatment when they enter video markets to compete against incumbent cable companies.[46] The Commission also has concluded that local exchange carriers entering in-region long-distance markets for the first time are non-dominant.[47] The right regulatory course in those markets, the Commission again concluded, is to maintain suitable separation between fully competitive and less-than-fully-competitive services, not to impose regulation on the competitive side of the line.

This body of precedent strongly supports the deregulation of high-speed data services. First, as ALTS admits, incumbent LECs will be second-to-market entrants in the emerging market(s) for these services. Commission precedent therefore firmly supports classifying incumbent LECs as non-dominant in the provision of high-speed data services. Second, whatever essential facilities incumbent LECs control have been fully unbundled. Commission precedent therefore firmly supports permitting incumbent LECs to compete in this market, subject, of course, to the continued unbundling of whatever essential local facilities they may still control. Finally, as demonstrated above, the emerging market(s) for high-speed data services are being served competitively, by providers who face no regulation at all in the provision of

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[45] See Hyperion Telecommunications, Inc., 12 FCC Rcd 8596 (1997).

[46] See 47 U.S.C. §§ 651(a)(4), 653 (establishing liberal regulatory conditions for Open Video Systems); id. § 651(c) (exempting common carrier video from §214); id. § 623 (a)(2) (exempting cable systems subject to "effective competition" from rate regulation).

[47] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order, 98 FCC2d 1191, 1198-99, ¶ 9 (1984).

such services. Commission precedent therefore supports complete deregulation of incumbent LECs in the provision of these competitive services.

The case for deregulation is all the more compelling because the services at issue center on risky innovation and the deployment of cutting edge technology. Over-regulation has the very real potential to stifle markets like these, as the Commission's former chief economist has recognized. In 1997, Joseph Farrell called for the "deregulation of innovation," specifically citing high-speed data services as an example. Innovative add-ons to the basic network should not themselves be subject to unbundling regulation, Farrell argued, so long as the core elements of the traditional monopoly network are.

> [W]hen an incumbent creates a "new" network element, perhaps the new one need not immediately be made available on regulated terms, provided the old one remains available to non-incumbents. I have in mind, for instance, the case where the incumbent builds new high-capacity loops to some of its subscribers, leaving the old copper in place (and in good shape); or where it installs a new switch and leaves the old one "co-located."[48]

SBC and other incumbent LECs are already providing the two key elements that CLECs need to provide their own ADSL services over copper loop: unbundled loops and collocation. And, as noted, copper loop itself is not needed: today's dominant providers of such services use cable, satellite, or other non-incumbent LEC facilities. There is thus no need at all to require further unbundling of any additional equipment or service that SBC and other incumbent LECs might provide by adding innovative new electronics to existing copper loop.

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[48] Joseph Farrell, Competition, Innovation and Deregulation, Speech at Merrill Lynch Telecommunications CEO Conference, New York, March 19, 1997. See also, id. ("[W]hen an ILEC invests in a 'parallel, better' infrastructure, such as fiber to the home, perhaps it should be able to keep that from competitors, for a while or even for as long as it wants, provided that the old infrastructure is still available on an unbundled basis, is properly maintained, and so on.").

5. Section 706 and Section 10 Support the Further Deregulation of High-Speed Data Services.

As described in SBC's Petition for Relief, and in the Section 706 petitions filed by other BOCs, Sections 706 and 10 grant the Commission broad, independent authority to deregulate the provision of advanced telecommunications services by incumbent LECs. Section 10 gives the Commission broad authority to forbear from all provisions of the Communications Act, except for Sections 251(c) and 271. And, for the limited, but critical purpose of "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans,"[49] Section 706 permits the Commission to take additional deregulatory steps, including forbearance under Sections 251(c) and 271.[50]

Granting such relief is in the public interest. As noted in SBC's Petition for Relief, requiring incumbent LECs to "unbundle" and sell to their competitors whatever new capabilities and services they add to their networks,[51] at rates "based on the cost[s] of providing" them,[52] creates a strong disincentive to invest. On new, risky investment in facilities and services that turn out to be very popular, such regulation ensures that Bell Companies can hope to recover no more than their actual costs. New, risky investments that fail, by contrast, will end up charged to Bell Company shareholders, through the vehicle of price-cap regulation. Regulation that works in such a manner will suppress risky investment entirely. The Commission should be doing all it

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[49] Pub. L. 104-104, Title VII, § 706(a).

[50] Additional arguments in support of this interpretation of Section 706 can be found in SBC's Petition for Relief, and in the 706 petitions that the other RBOCs have filed.

[51] 47 U.S.C. § 251.

[52] 47 U.S.C. § 252(d).

can to promote precisely the opposite. As Farrell notes, regulators must ensure that "reward to investment [is] given great weight."[53]

Imposing unbundling and price regulation on new high-speed data capabilities deployed by incumbent LECs will have a second deleterious impact on investment and competition: it will suppress new investment by CLECs themselves, including many of ALTS's own members. Most states set prices below even the incremental cost of providing service, and still further below the actual book cost including capital and depreciation. It makes no sense to build and deploy what you can buy more cheaply from others. Least of all, to build and deploy innovative new technology that is to be offered in an already competitive market, where there is a real risk that it will not turn out to be what customers want.

CLECs themselves are divided on these points, and for good reason. Facilities-based CLECs like TCG acknowledge "a real and substantial risk that the development of facilities-based local competition can be adversely affected if wholesale or retail rates are priced inequitably relative to unbundled element costs, creating an uneconomic price squeeze. . . . [The FCC] must ensure that wholesale competition does not drive out or diminish the development of strong, facilities-based competition."[54] The CLECs who disagree are the ones who prefer regulatory arbitrage to building real networks. They are the ones who insist that the Commission

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[53] J. Farrell, Competition, Innovation and Deregulation, supra n.47.

[54] Comments of Teleport Communications Group, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, at 57, CC Dkt. No. 96-98 (FCC May 16, 1996).

should unbundle and price regulate everything, everywhere – new services no less than old, competitive services no less than uncompetitive ones, innovation no less than tried and true.[55]

ALTS itself has said as much in a brief filed recently with the U.S. Supreme Court.[56] There, ALTS recognizes – and indeed emphasizes -- that the Act draws a fundamental distinction between "the bottleneck unbundled network elements needed to provision competitive local services," on the one hand, and, on the other, competitively supplied "non-bottleneck facilities," particularly "new investments . . . based on state-of-the-art technology, th[at] deliver advanced telecommunications services in a more efficient manner than existing facilities."[57] The Commission, ALTS argues, should not have permitted CLECs to recombine UNEs at cost-based rates; wholesale discount rates should apply instead. By doing so, ALTS argues, the Commission failed "to recognize the fundamentally distinct policy concerns between the pricing of bottleneck and non-bottleneck facilities."[58] The Commission, ALTS maintains, erred in applying its "pricing paradigm for bottleneck facilities . . . indiscriminately to non-bottleneck

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[55] See, e.g., Comments the Telecommunications Resellers Association, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, at iii, 13, 15-16, CC Dkt. No. 96-98 (F.C.C. May 16, 1996) ("[R]esale of telecommunications services generates numerous public benefits, among which are the downward pressure resale exerts on rates and the enhancements resale produces in the diversity and quality of product and service offerings.").

[56] Opposing Brief on the Merits of the Association for Local Telecommunications Services, Association for Local Telecommunications Services v. Iowa Utilities Board, No. 97-826 (May 18, 1998).

[57] Id. at 7-8.

[58] Id. at 9.

network elements."[59] As a result, ALTS reasons, the Commission's rules "fail to provide appropriate incentives for competitive investment."[60]

For good reason, all current regulatory trends are in the opposite direction, most especially in the sphere of advanced, high-speed telecommunications services. Cable operators face no regulation when they provide cable modem service.[61] Operators of digital, DBS satellites are already almost completely free to provide any kind of services they wish, subject to almost no rate, content, or carriage regulation.[62] As non-dominant carriers, CLECs face minimal regulation of their advanced services. Permitting incumbent LECs to compete on the same, deregulated, terms can only promote more vigorous competition.

6. ALTS Is Attempting to Use Section 706 to Re-Litigate Interconnection Issues Already Resolved by the Commission and State Regulators or Currently Pending in Interconnection and Arbitration Proceedings.

Pursuant to Sections 251, 252, and 271, the Commission in the past two years has conducted extensive proceedings to define incumbent LECs' unbundling and interconnection obligations. The Commission left open the possibility it might itself revisit unbundling requirements, but decided not to require incumbent LECs to unbundle or provide interconnection to high-speed data network equipment. As permitted by the Commission's rules adopted in the

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[59] Id.

[60] Id.

[61] See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Buy-Through Provisions, Second Order on Reconsideration, Fourth Report on Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4131 (1994).

[62] See Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 90 FCC2d 676, 709 (1982).

1996 Local Interconnection Order,[63] a handful of states have attempted to extend unbundling and interconnection obligation to such equipment in Section 271 and arbitration proceedings.

ALTS now asks the Commission to transform those scattered state rulings into a new federal policy,[64] and (it appears) to extend them into an entire new list of interconnection and unbundling mandates.[65] The Commission should summarily reject that invitation. Extending unbundling and interconnection to this new, emerging class of networks, at this early point in their evolution, would be inconsistent with the purpose of this regime, with decades of established Commission policy, and with the particular language and intent of Section 706.

If at some point in the future LECs – or, equally, one or another of ALTS's own members – should emerge as a market-dominant provider of high-speed digital services, the Commission will, of course, remain free to regulate as necessary, consistent with its powers under Section 251 of the 1996 Act, or its other authority under the 1934 Act. For now, the Commission should do precisely the opposite. It should reject ALTS's petition and re-affirm its policy of deregulating these emerging, competitive, markets, as requested by SBC and other LECs in their 706 petitions.

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[63] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, ¶ 244 (1996).

[64] ALTS specifically asks the Commission to adopt as federal requirements, state policies that would (a) require ILECs to provide combinations of UNEs; (b) require subloop unbundling at four points: NID, distribution cable, concentration electronics, feeder cable; and (c) require performance measurements regarding the availability of DSL loops. See ALTS Pet. at 39-44.

[65] For example, ALTS complains that individual or numerous incumbent LECs have not provided xDSL functionality as UNEs, ATLS Pet. at 15-16; have not provided access to mid-loop electronics, id. at 16; have disabled load coils and bridge taps on loops, id. at 17; have not properly provided collocation, id. at 19; and have not provided 56 and 64 Kbps data loops as UNES, id. at 13.